Small Group: International Treaties in U.S. Courts

Professor Carlos M. Vázquez

Fact Patterns

Judicial Enforcement of Treaties

Hypothetical 1. The Vienna Convention is a self-executing treaty to which the United States and Honduras are parties. Article 36 of the Convention provides that, if a national of one state-party is arrested or detained in any way by the authorities of another state-party, the detainee has a right to request that consular officers of his state be informed of his detention, and the detaining authorities have the obligation to inform the consular officers of the detention without delay. The Convention also gives the consular officers the right to communicate with the detainee and to aid in his defense. Finally, Article 36 provides that "[t]he said authorities shall inform the person concerned without delay of his rights under this sub-paragraph."

Mario Bustillo was arrested by Virginia authorities and charged with murder. He was never notified of his right to have his consul informed of his arrest. He was assigned defense counsel, but defense counsel did not inform him of his rights under the VCCR. Bustillo claimed during his trial that his was a case of mistaken identity. The true murderer was another Honduran, known as "Sirena." The prosecutor ridiculed this defense at trial, questioning whether this "so-called Sirena" even existed. Bustillo was convicted and sentenced to 30 years in prison.

After his conviction was affirmed on appeal, Bustillo obtained new pro bono counsel. For the first time, Bustillo learned of his rights under the Vienna Convention. New counsel contacted the Honduran consulate and was told that

they would certainly have offered assistance to Bustillo at his trial. Among other things, the consulate could have verified that "Sirena" did exist and that he returned to Honduras shortly after the murder. With the consulate's assistance, new counsel tracked down Sirena and surreptitiously videotaped him bragging about having gotten away with murder.

Through his new counsel, Bustillo attempted to obtain collateral relief in the Virginia courts. He argued that he deserved a new trial because of the state's failure to inform him of his right to have his consulate informed of his arrest. Had he been informed of his VCCR rights, he argued, the consulate would have provided material assistance which would likely have resulted in his acquittal. The warden argued in response (a) that Bustillo had forfeited his Vienna Convention claim by failing to raise it at trial, and (b) the Vienna Convention does not confer rights that are enforceable by individuals in U.S. courts. The Virginia court denied relief on procedural default grounds, relying on Breard v. Greene, a 1998 decision by the U.S. Supreme Court holding that rights under Article 36 of the Vienna Convention are subject to state procedural default rules.

While his case was pending in the Virginia courts, the International Court of Justice decided a case brought by Mexico against the United States involving the Vienna Convention. The ICJ decided, among other things, that Article 36 of the VCCR confers judicially enforceable rights and that such rights are not subject to forfeiture under procedural default doctrines. The ICJ exercised jurisdiction pursuant to the Optional Protocol to the VCCR, under which the United States had consented to the jurisdiction of the ICJ in cases involving the VCCR. Under the Statute of the International Court of Justice, another treaty to which the United States is a party, the United States is obligated to with the judgment of the ICJ in any case decided against it.

The U.S. Supreme Court subsequently granted certiorari to review the Virginia Supreme Court's denial of collateral relief on grounds of procedural default. The

case was decided along with another Vienna Convention case, Sanchez-Llamas v. Oregon. The Court decided the two cases this June; its decision is attached. In Bustillo's case, the Court decided that the ICJ's interpretation of the VCCR was not binding because the judgment in that case did not extend to Bustillo. The Court held that the ICJ's interpretation of the VCCR was nonetheless entitled to "respectful consideration." Giving such consideration to the ICJ's decision, the Court concluded that the VCCR is indeed subject to state procedural default rules. The Court accordingly adhered to its holding in Breard v. Greene. The Court expressly left open the question whether the VCCR confers rights that are judicially enforceable by individuals in our courts.

Bustillo is currently serving his sentence in a prison in Virginia. He has brought suit against his trial counsel in the U.S. District Court for the Northern District of Virginia, seeking damages for legal malpractice. He claims that his counsel committed malpractice by failing to raise his Vienna Convention claim at trial, or to inform him of his rights under that Convention, thus resulting in the forfeiture of that right. Again, he claims that, had the consulate been informed, it would have provided material assistance that would likely have resulted in an acquittal.

Trial counsel admits that he was unaware of the VCCR at the time of Bustillo's trial. He argues, however, that the failure to raise the VCCR claim could not have prejudiced Bustillo, and cannot be the basis for the current claim, because the VCCR does not create rights that are judicially enforceable by individuals in domestic courts. He relies on a decision to that effect handed down by the U.S. Court of Appeals for the Fourth Circuit after Bustillo's trial but before the ICJ's contrary decision. The Fourth Circuit relied on the preamble of the VCCR, which recites, among the reasons for concluding the Convention, the following:

> . . . that an international convention on consular relations, privileges and immunities would . . . contribute to the development of friendly relations among nations, irrespective of their differing

> constitutional and social systems, [and] . . . that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States . . . .”

How should the U.S. district court rule?

Hypothetical 2. In Johnson v. Eisentrager, the Supreme Court in a footnote said the following about the Geneva Convention of 1929:

> We are not holding that these prisoners have no right which the military authorities are bound to respect. The United States, by the Geneva Convention of July 27, 1929, 47 Stat. 2021, concluded with forty-six other countries, including the German Reich, an agreement upon the treatment to be accorded captives. These prisoners claim to be and are entitled to its protection. It is, however, the obvious scheme of the Agreement that responsibility for observance and enforcement of these rights is upon political and military authorities. Rights of alien enemies are vindicated under it only through protests and intervention of protecting powers as the rights of our citizens against foreign governments are vindicated only by Presidential intervention.

In Hamdan v. Rumsfeld, the habeas petitioner claimed that the military commissions established by President Bush were invalid because, among things, they contravened the Geneva Conventions of 1949. (Assume that there is no pertinent difference between the 1929 and 1949 Geneva Conventions.) The respondent argued that the Geneva Conventions were not judicially cognizable for the reason set forth in the Eisentrager footnote. The U.S. Supreme Court addressed this issue as follows:

> Buried in a footnote of the opinion, however, is this curious statement suggesting that the Court lacked power even to consider the merits of the Geneva Convention argument: [quotation of Eisentrager footnote omitted] The Court of Appeals, on the strength of this footnote, held that "the 1949 Geneva Convention does not confer upon Hamdan a right to enforce its provisions in court." 415 F.3d at 40.

Whatever else might be said about the Eisentrager footnote, it does not control this case. We may assume that "the obvious scheme" of the 1949 Conventions is identical in all relevant respects to that of the 1929 Convention, and even that that scheme would, absent some other provision of law, preclude Hamdan's invocation of the Convention's provisions as an independent source of law binding the Government's actions and furnishing petitioner with any enforceable right.[*] For, regardless of the nature of the rights conferred on Hamdan, cf. United States v. Rauscher, 119 U.S. 407, 7 S. Ct. 234, 30 L. Ed. 425 (1886), they are, as the Government does not dispute, part of the law of war. See Hamdi, 542 U.S., at 520-521, 124 S. Ct. 2633, 159 L. Ed. 2d 578 (plurality opinion). And compliance with the law of war is the condition upon which the authority set forth in Article 21 [of the Uniform Code of Military Justice] is granted.

There are currently numerous cases pending brought by Guantánamo detainees challenging various aspects of their detention as contravening the Geneva Conventions.

---

[*]But see generally Brief for Louis Henkin et al. as Amici Curiae; 1 Int'l Comm. for the Red Cross, Commentary: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 84 (1952) ("It should be possible in States which are parties to the Convention . . . for the rules of the Convention to be evoked before an appropriate national court by the protected person who has suffered a violation"); GCII Commentary 92; GCIV Commentary 79.

How should the courts address these petitioners' reliance on those Conventions?

For purposes of discussion, disregard the following provision of the Military Commissions Act, signed into Law on October 17:

> No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party as a source of rights in any court of the United States or its States or territories.